STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM DONALD HARRIS,

Defendant-Appellant.

UNPUBLISHED
May 26, 2005

No. 256959
Marquette Circuit Court
LC No. 3-41167-FH

Before: Murray, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for three counts of criminal sexual conduct in the fourth degree (CSC IV), MCL 750.520e(1)(a) and three counts of accosting for immoral purposes, MCL 750.145a. Defendant was sentenced to sixteen months' to two years' imprisonment for each of the criminal sexual conduct convictions, and twenty-three months' to four years' imprisonment for each of the accosting for immoral purposes convictions. All sentences were to be served concurrently. This case arises out of defendant's touching of four middle-school aged male victims who came into contact with defendant while doing yard work and other odd jobs around defendant's home. On appeal, defendant challenges the sufficiency of the evidence presented at trial and argues that the scoring of the guidelines was clearly erroneous. Because the record does not support defendant's arguments, we affirm.

Defendant first argues that the prosecution failed to present sufficient evidence to sustain his three CSC IV convictions, MCL 750.520e(1)(a). Defendant claims that the evidence was insufficient because the prosecution did not provide evidence to contradict his testimony that the touching of the three young men was not intentional and was not for a "sexual purpose" or for "sexual gratification." When reviewing a claim based on insufficiency of the evidence, we review the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The evidence must be viewed in the light most favorable to the prosecution to determine whether the prosecution proved the elements of the crime beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack, supra* at 400. Circumstantial evidence and reasonable inferences arising from the evidence can constitute the requisite proof of the elements of a crime. *Id*. The prosecution "is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility; it need only convince the jury 'in the face of whatever contradictory

evidence the defendant may provide.'" *Id*., quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995).

MCL 750.520e states that a person is guilty of CSC IV if he or she engages in sexual contact with a person between the ages of thirteen and sixteen and the actor is five or more years older than that young person. Under MCL 750.520a(n), "sexual contact" includes intentional touching of a victim's intimate parts or clothes covering those intimate parts if that intentional touching could be reasonably construed as being for the purpose of sexual gratification. See *People v Piper*, 223 Mich App 642, 647; 567 NW2d 483 (1997).

Defendant asserts that the prosecution did not sustain its burden because the evidence was inconclusive at best regarding whether any touching was done to achieve a "sexual purpose" or for "sexual gratification." Defendant specifically argues that the testimony of the victims' was that defendant was just "joking around" when defendant "briefly touched the victims' buttocks" and therefore a rational trier of fact could not find the elements of CSC 4 even when viewing the evidence most favorably to the prosecution. Our review of the record reveals that record evidence to the contrary.

Matthew Tryan, aged 14, testified that defendant touched both his "butt and [his] front private part" more than once. Tryan testified that upon grabbing his penis, defendant stated "that's a big one." Nicholas Swan, aged 13, testified that while riding in the back seat of defendant's vehicle, when they reached a stop light, defendant turned around, reached back, and "grabbed my front privates." Tony Vencato, aged 14, testified that when he went to sit down on the tailgate of defendant's truck, defendant put his hand down right before Vencato sat and "grabbed [his] behind." All three victims testified that defendant would "grab at" their buttocks as they exited his vehicle.

In addition to the physical groping and touching, the evidence showed that defendant repeatedly subjected the victims to sexual matters. Defendant admitted that he referred to the victims as "needle dick." Defendant had pornographic movies available in his home for the boys to view, and on at least two occasions, victims viewed the pornographic films. On many occasions, defendant offered victims money in exchange for the performance of sexual acts, specifically referencing a "hand job" or a "blow job." Defendant also masturbated in front of Tryan two separate times. In light of this evidence, while drawing all reasonable inferences in support of the jury verdict, clearly the jury could have reasonably concluded that defendant's intent was for a sexual purpose. *Nowack, supra* at 400.

Viewing the evidence in a light most favorable to the prosecution, the jury could have reasonably concluded that defendant was not credible and that the testimony of the victims was sufficient to convict defendant of all three counts of CSC IV. That defendant presented a different account of the incidents – that he was merely joking around – does not negate that there was sufficient evidence to convict. *Nowack, supra* at 400; *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998).

Next, defendant argues that the prosecution failed to present evidence sufficient to convict him of three counts of accosting for immoral purposes, MCL 750.145a. Defendant claims that the evidence was insufficient because the prosecution did not provide any evidence to show that defendant had any actual intent to induce any of the victims to commit a sexual act.

Any person who accosts, entices, or solicits a child less than 16 years of age with the intent to induce or force that child to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or any other act of depravity or delinquency, or shall suggest to such child any of those acts is guilty of a felony. MCL 750.145a; *People v Meyers*, 250 Mich App 637, 639; 649 NW2d 123 (2002).

Tryan, Vencato, and Mathew Morgan, aged 14, all testified that defendant offered them money in exchange for the performance of a sexual act. On one occasion when Tryan expected to get paid for work he performed, defendant took Tryan's wallet and put $100 in it. Defendant then stated that he would give Tryan $100 for a "hand job." Tryan returned the money. Morgan testified that defendant offered him "$500 for a blow job, and $100 for a hand job" more than a dozen times. Vencato testified that defendant talked about "jacking off" and also offered him money in exchange for performing sexual acts.

The evidence that defendant physically put money into Tryan's wallet to induce him to perform a sexual act, together with defendant's groping of the victims, and repeated offers to multiple victims of money in exchange for sexual acts, plainly displays that defendant had actual intent to induce the victims to commit sexual acts. Contrary to defendant's argument, when viewing the evidence in the light most favorable to the prosecution, the evidence sufficed to prove the essential elements of accosting a child for immoral purposes including intent. Again, that defendant presented a different account of the incidents, specifically that his comments were not serious, does not negate that there was sufficient evidence to convict. *Nowack, supra* at 400; *Lemmon, supra* at 646.

Finally, defendant also challenges the trial court's scoring of his sentencing guidelines, specifically, Offense Variable 10 (OV-10). Pursuant to MCL 769.34(10), because defendant raised this issue at sentencing, it is preserved for our review. Although we review for clear error the trial court's factual findings at sentencing, we will uphold the trial court's scoring of the sentencing guidelines if there is any evidence in the record to support it. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant contends that he is entitled to resentencing because the court's scoring of OV-10 was clearly erroneous as a matter of law. In calculating OV-10, exploitation of a vulnerable victim, a court must assess ten points if the "offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). The term "exploit" means "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). After reviewing the record, we agree with the trial court's assessment of 10 points for OV-10. The jury's verdicts necessarily include found elemental facts and therefore, establish the facts upon which the offense variable is predicated.

The record evidence undoubtedly demonstrates that defendant attempted to manipulate the young adolescent victims for purposes of sexual gratification. Defendant, who was more than forty years older than any of the victims, took advantage of the victims' youth for his own selfish and unethical purposes. Defendant exerted authority over the victims when he enticed the victims to be at his home by paying them to do yard work and other odd jobs around his house with money and other items (i.e. a promise of a go-cart at the end of the summer.) Defendant

repeatedly used money in his position of authority over the victims to coerce them to engage in sexual activities with him. The victims were all young adolescents under the age of 14 at the time of the incidents who were susceptible to persuasion and temptation from an older adult. Contrary to defendant's argument, that none of the victims were ultimately persuaded by defendant to engage in a sexual act, and that defendant never used physical restraint is of no consequence. We therefore affirm the trial court's scoring decision.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Pat M. Donofrio